IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERG CHILLING SYSTEMS INC.,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
HULL CORPORATION, et al.,	:	**No. 00-5075**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **August 3, 2004**

Plaintiff Berg Chilling Systems, Inc. ("Berg") brings this action against Defendants Hull Corporation ("Hull") and SP Industries, Inc. ("SPI") seeking contractual damages and indemnification from settlement payments made by Berg to Huadu Meat Products Company ("Huadu"). After a bench trial, the Court entered a judgment on June 10, 2003 (the "District Court Order"), *Berg Chilling Sys., Inc. v. Hull Corp.*, Civ. No. 00-5275, 2003 WL 21362805 (E.D. Pa. June 10, 2003), which was reversed on appeal by the United States Court of Appeals for the Third Circuit on May 25, 2004 (the "Third Circuit Opinion"), *Berg Chilling Sys., Inc. v. Hull Corp.*, 369 F.3d 745 (3d Cir. 2004). Presently before this Court are several issues remanded by the Court of Appeals.

I. BACKGROUND[1]

In 1995, Berg contracted to provide an industrial freeze-drying system to Huadu, a Chinese company. *Id.* at 747. Berg then contracted with Hull to obtain the freeze dryers that comprised a significant portion of the freeze-drying system. *Id.* at 748. Various problems arose in Hull's delivery of the freeze dryers to Berg and Berg's subsequent shipment of them to Huadu, as a result

[1] The full factual background of this case is discussed in detail in the District Court Order and the Third Circuit Opinion.

of which the freeze dryers did not function properly when Huadu received them in April 1997. *Id.* at 748-49.

On August 27, 1997, while Huadu, Hull, and Berg were attempting to negotiate a solution to the freeze dryer situation, Hull entered into an Asset Purchase Agreement ("the Agreement") with SPI. *Id.* at 749. Pursuant to the Agreement, the food, drug, and chemical ("FDC") division of Hull, which was the division that had produced the freeze dryers for Berg, was sold to SPI. *Id.* In exchange, SPI gave Hull $6 million cash (Asset Purchase Agreement § 3.1) and assumed some of the FDC division's operating liabilities (Asset Purchase Agreement § 2.1). The Asset Purchase Agreement also contained, inter alia, a choice-of-law provision requiring the application of New Jersey law (Asset Purchase Agreement § 10.6), and a clause providing that SPI "does not assume any liability to any third party claimant" (Asset Purchase Agreement § 7.8).

Prior to closing on the asset sale, the president of Hull sent a letter to Berg stating that if the FDC division were sold to another corporation, Hull's responsibility to Berg would be transferred to "the successor." *Berg Chilling*, 369 F.3d 745 at 750. Hull and SPI also made public statements characterizing their transaction as a merger of SPI and the FDC division. *Id*. After the closing, SPI operated the former FDC division as a division of SPI known as the "Hull Company," *id*., and named Hull's chairman the honorary chairman of the new division. (*See* R. at 192-93 (Jan. 14, 2003).)

Through the Hull Company, SPI attempted to repair the Huadu freeze dryers, but was unsuccessful. *Berg Chilling*, 369 F.3d 745 at 750. Accordingly, Huadu filed an international arbitration action against Berg on March 29, 1999. *Id.* at 750-51. Berg requested that Hull engage in a joint defense against Huadu, but Hull refused to participate in the proceedings. *Id.* at 751. On December 7, 2000, Huadu won an arbitral award of approximately $2.5 million against Berg. *Id.*

at 752. The arbitrators expressly declined to make any findings concerning Hull's liability to Berg for any portion of this award. *Id.*

While the arbitration proceedings were ongoing, Berg filed suit against Hull and SPI in this Court, seeking, inter alia, indemnification from any damages awarded to Huadu in the arbitration. *Id.* Hull and SPI then filed cross-claims against each other for indemnification. *Id*. After the arbitration award but before the District Court action had advanced significantly, Berg and Huadu entered into a settlement agreement under which Berg agreed to refund $1 million to Huadu. *Id.* Berg also agreed to allow Huadu to retain the freeze dryers—an "equipment credit" that Berg and Huadu valued at $650,000. *Id.*

This Court held a bench trial in January 2003 and issued its ruling on June 11, 2003, entering judgment: (a) against Berg on its claim for indemnification from the equipment credit and attorneys' fees and costs; (b) in favor of Berg and against Hull for one-third of the $1 million settlement payment; (c) in favor of Berg and against SPI for another one-third of that payment; and (d) against each of Hull and SPI on their respective cross-claims for indemnification. *Berg Chilling,* 2003 WL 21362805, at *12-13. Berg and SPI appealed the portions of these decisions adverse to them,[2] and the Third Circuit reversed, holding that: (a) Hull is liable to Berg in the amount of $1 million plus the equipment credit[3] and attorneys' fees and costs incurred in the arbitration proceeding; and (b)

[2] Because Hull did not participate in the appeal, the District Court's holding that SPI was not liable to Hull for indemnification remains in effect. *Berg Chilling*, 369 F.3d at 753 & n.23.

[3] In the District Court Order, this Court declined to include the value of the equipment credit in the calculation of Berg's damages because there was insufficient evidence to establish its monetary value, and because Berg would have incurred substantial costs in retrieving the equipment from China. The Third Circuit reversed, holding that this Court's ruling was "completely devoid of minimum evidentiary support displaying some hue of credibility [and bore] no rational relationship to the supportive evidentiary data." *Berg Chilling*, 369 F.3d at 765 (citation omitted). The Third

Hull is liable to SPI for indemnification, including attorneys' fees and costs. *Berg Chilling*, 369 F.3d at 766. The Third Circuit remanded the question of whether SPI is liable to Berg and, if so, whether SPI and Hull's liability is several or joint and several. *Id*.

Hull is not participating in these remand proceedings, as it is no longer in business and has no assets. (Mot. of Gregory Liacouras, Esq. and Liacouras & Smith, LLP for Leave to Withdraw as Counsel for Hull Corporation at 1); *see also Berg Chilling*, 369 F.3d at 753 & n.23.

II. DISCUSSION

The Third Circuit held that § 7.8 of the Asset Purchase Agreement, which provides that SPI "does not assume any liability to any third party claimant," precluded a finding that SPI was liable to Berg on the basis of the Agreement. The Third Circuit noted, however, that SPI could be held liable to Berg if § 7.8 were void as against public policy. In addition, the appellate court directed this Court to determine whether SPI is liable to Berg under the doctrine of successor liability. Each of these issues is discussed below.

Circuit then explained, however, that "there is another possible basis" for excluding the credit: Berg may not have surrendered the value of the dryers because they may have been Huadu's legal property at the time the settlement was executed. *Id*. at 765 n.43. The appellate court expressly "[made] no ruling on this point." *Id*. Thus, the Third Circuit Opinion is ambiguous as to whether it simply rejects the District Court's rationale for excluding the equipment credit, *see id*. at 765 ("It would prove too much to deny Berg a recovery *by reason of* [the cost of recovering the equipment]. . . . Thus, we will not deny Berg the $650,000 recovery *on the theory that* it saved money by leaving the Equipment with Huadu. Overall, . . . there was no valid reason to reject the claim for damages *predicated on the value of the equipment* . . . ." (emphasis added)), or actually requires the Court to include that credit in the calculation of Berg's damages, *see id*. at 756 n.28 ("[T]he entire $1,000,000 plus, as will be seen, $650,000 for the Equipment Credit, should be assessed against Hull."). The Judgment accompanying the Third Circuit Opinion, however, unambiguously requires this Court to include the equipment credit in the award. *Berg Chilling Sys., Inc. v. Hull Corp.*, Nos. 03-2977, 03-3020, Judgment at 3 (3d Cir. May 25, 2004) ("In computing Berg's damages, the [district] court shall allow $650,000 for the equipment credit.").

A. Validity of § 7.8 of the Asset Purchase Agreement

In a prior opinion, this Court held that the interpretation of the Asset Purchase Agreement is governed by New Jersey law pursuant to the Agreement's choice-of-law clause. *Berg Chilling Sys., Inc. v. Hull Corp.*, Civ. No. 00-5075, 2002 WL 31681955, at *5 (E.D. Pa. Nov. 26, 2002). Although the Third Circuit reversed the extension of this holding to Berg's indemnification claims against Hull and SPI, the Third Circuit Opinion did not address or call into question this Court's holding that the choice-of-law clause governs interpretation of the contract itself. *See Berg*, 369 F.3d at 760 (discussing opinion of November 26, 2002). Thus, the Court abides by its previous holding that interpretation of § 7.8 is governed by New Jersey law.

Berg argues that § 7.8 of the Asset Purchase Agreement is void as contrary to public policy, and therefore SPI has no contractual basis to avoid contractual liability to Berg. Berg provides two purported legal bases for this argument, neither of which is persuasive. First, Berg cites to two New Jersey statutes, which provide, respectively, that:

> A covenant, promise, agreement or understanding in . . . a contract . . relative to the construction, alteration, repair, maintenance, servicing, or security of [an] . . . appliance, . . . purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee . . ., is against public policy and is void and unenforceable.

N.J. STAT. ANN. § 2A:40A-1.

> A covenant, promise, agreement or understanding in . . . a contract . . . whereby an . . . engineer . . . shall be indemnified or held harmless for damages . . . caused by or resulting from the sole negligence of an . . . engineer . . . and arising either out of (1) the preparation or approval by an . . . engineer . . . of . . . designs or specifications . . ., is against public policy and is void and unenforceable.

N.J. STAT. ANN. § 2A:40A-2.

It is plain from the face of these statutes that they have no application to the instant action. First, they both refer explicitly to disclaimers of *negligence*—i.e., tort—liability, which are disfavored because they may leave innocent third-party tort victims without recompense. Berg has not cited, nor has the Court found, any case applying these statutes to a breach-of-contract action. *See Carvalho v. Toll Bros. & Developers*, 675 A.2d 209, 215 (N.J. 1996) (applying statute to negligent construction accident); *Bradford v. Kupper Assocs.*, 662 A.2d 1004, 1007 (N.J. Super. Ct. App. Div. 1995) (applying statute to negligent death of sewer worker). Second, even if the Court were to find that Berg's damages were caused by SPI's negligence, the statutes apply only to situations in which such damages are caused by the contracting party's "*sole* negligence." In the instant case, the Third Circuit explicitly held that Berg's damages were caused, at least in part, by Hull, *Berg Chilling*, 369 F.3d at 760-61, and so these damages cannot be attributed to SPI's "sole negligence." Thus, § 7.8 is not void under the statutory rationale proffered by Berg.[4]

Berg also challenges the validity of § 7.8 as contrary to the New Jersey common-law public policy against exculpation of professionals. Berg cites two cases in support for this argument. In *Erlich v. First Nat'l Bank of Princeton*, the court held invalid a clause in a financial services contract that precluded liability on the part of the service provider for damages caused by its financial recommendations. 505 A.2d 220, 233 (N.J. Super. Ct. App. Div. 1984). This holding, however, was explicitly based on tort and malpractice law and has no apparent application either to breach-of-contract actions or to third-party liability. *Id*. ("I do not need to reach the merits of the contract claim, because I view this case as essentially one in tort."). Second, Berg cites *Lucier v. Williams*,

[4] In addition, any reasonable reading of these statutes in their unexpurgated form demonstrates that they are directed toward building construction contracts, and that the "engineer" referred to therein is a construction engineer, not an engineer of freeze-drying equipment.

which is even less relevant to the instant case because, in addition to being a tort case, it was decided on unconscionability grounds not applicable here. 841 A.2d 907, 912 (N.J. Super. Ct. App. Div. 2004) (finding home inspector's disclaimer of liability unconscionable because: (1) contract was one of adhesion; (2) parties had "grossly unequal bargaining status"; and (3) substance of provision "eviscerated the contract and its fundamental purpose"). In total, therefore, Berg has not provided any legal basis under which § 7.8 might be found invalid, and the Court accordingly holds, in concert with the Third Circuit Opinion, that SPI has no liability to Berg under the Asset Purchase Agreement.

B. Successor Liability

The Court agrees with both parties that, for the purposes of this action, there is no material difference between New Jersey and Pennsylvania successor liability law, and therefore this Court need not decide which state's law governs the successor liability issue. Under both New Jersey and Pennsylvania law, a successor corporation may assume the liabilities of its predecessor if the successor constitutes a "mere continuation" of the predecessor, or if the transaction constitutes a "de facto merger." *Luxliner P.L. Export v. RDI/Luxliner*, 13 F.3d 69, 73 (3d Cir. 1993) (discussing New Jersey law); *Dale v. Webb Corp.*, 252 F. Supp. 2d 186, 189 (E.D. Pa. 2003) (discussing Pennsylvania law). Many courts have combined the relevant inquiry under these two doctrines into a single analysis. *Luxliner*, 13 F.3d at 73; *Continental Ins. Co. v. Schneider, Inc.*, 810 A.2d 127, 135 (Pa. Super. Ct. 2002) ("We note that courts have acknowledged the difficulty in differentiating between a mere continuation of business and a de facto merger."); *cf. Atl. Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1284 n.22 (E.D. Pa. 1994) (noting, under similar federal common law, that "[t]he 'substantial continuity' test shares many features with the traditional 'de facto merger' exception").

Factors relevant to this analysis include whether: (a) there was continuity of stock ownership; (b) there was continuity of business operations, management, control, physical location, and assets; (c) the successor assumed the operating liabilities of the predecessor; and (d) the seller corporation ceased operations soon after the asset sale. *See Luxliner*, 13 F.3d at 73; *Forrest v. Beloit Corp.*, 278 F. Supp. 2d 471, 476-77 (E.D. Pa. 2003) (setting out factors for Pennsylvania de facto merger) (*citing Phila. Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985)); *Continental Ins.*, 810 A.2d at 134-35 ("The primary elements of the continuation exception are identity of the officers, directors, or shareholders, and the existence of a single corporation following the transfer."). It should be noted, however, that "[n]ot all of these factors need be present for a de facto merger or continuation to have occurred." *Luxliner*, 13 F.3d at 73.

In this case, there was no continuity of stock ownership between Hull and SPI (*see* Asset Purchase Agreement § 3.1 (fixing consideration for sale at $6 million cash)),[5] and there was only limited assumption of operating liabilities by SPI. *See Berg Chilling*, 369 F.3d at 758 (holding that SPI did not assume Hull's pre-closing liabilities under Asset Purchase Agreement).[6] In addition, the Court takes judicial notice of the fact that Hull, which participated in this litigation through June 2003, did not cease operations soon after the 1997 asset sale. While it is true that there was partial

[5] Under Pennsylvania law, the lack of a stock transfer is probably fatal to Berg's de facto merger argument. *Forrest*, 278 F. Supp. 2d at 477 ("Plaintiff's de facto merger claim must fail as a matter of law because the stock transfer element is absent from the . . . transaction."); *Pol Am Pack v. Redicon Corp.*, Civ. No. 00-1833, 2000 WL 1539079, at *3 (E.D. Pa. Oct. 18, 2000) ("[T]he absence of a stock transfer is fatal to a claim of de facto merger.").

[6] Under the Asset Purchase Agreement, SPI assumed some of Hull's accounts payable, accrued expenses, and contractual obligations. (Asset Purchase Agreement § 2.1.) The Third Circuit, however, explicitly held that SPI "could not" be liable under the Agreement for products shipped by Hull prior to the closing date. *Berg Chilling*, 369 F.3d at 758.

continuity of business operations, physical location, and assets, in that SPI apparently took over and operated Hull's FDC plant, there was no transfer of any other portion of the Hull Corporation (*see* Asset Purchase Agreement § 1.3(g) (excluding from sale Hull's businesses outside of FDC division)), and there was little or no continuity in the management of the FDC division beyond the honorary title given to Hull's chairman.[7] (*See* R. at 192-93 (Jan. 14, 2003).) In short, the Asset Purchase Agreement simply transferred a portion of the Hull Corporation to SPI, and both corporations continued operating as before in all other respects. Thus, analysis of the factors set out above weighs heavily against finding an exception to the successor liability doctrine in this case, for there is no indication that the transaction in question constituted any more than a common asset sale. *See Widerman v. Mayflower Transit, Inc.*, Civ. No. 96-2036, 1997 WL 539684, at *5-6 (E.D. Pa. Aug. 6, 1997) (finding no liability where successor used name, employees, and plant of predecessor, but other factors were unmet). Accordingly, the Court finds that SPI is not liable to Berg under either the de facto merger or mere continuation doctrines.[8]

[7] Berg argues that Bernard Kashmer, Executive Vice President of Hull Corporation, was hired by SPI as Executive Vice President of Hull Company. The record indicates, however, that this was merely a temporary arrangement. (R. at 28 (Jan. 16, 2003) ("Jack Partridge [of SPI] . . . asked if I would be interested in continuing on [sic] an employee of SP Industries through a transition period, and I said I was.").) The other employees cited by Berg were not hired by SPI in executive capacities. *See Berg Chilling*, 2003 WL 21362805, at *6 (describing hiring of John Hull as consultant and John Fay as engineer).

[8] Because of the holding above that SPI is not liable to Berg, the Court does not reach the question of apportioning damages between SPI and Hull.

III. CONCLUSION

For the reasons set out above, the Court finds that SPI is not liable to Berg for indemnification. In addition, as directed by the Third Circuit, the Court holds that: (a) Hull is liable to Berg in the amount of $1,625,000.00, plus plus attorneys' fees and costs incurred in the arbitration proceeding; and (b) Hull is liable to SPI for indemnification, including attorneys' fees and costs. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERG CHILLING SYSTEMS INC.,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
HULL CORPORATION, et al.,	:	**No. 00-5075**
Defendants.	:	

ORDER

AND NOW, this **3rd** day of **August, 2004**, upon consideration of Plaintiff Berg Chilling Systems, Inc.'s Memorandum of Law on Remand, Defendant SP Industries, Inc.'s Initial Brief Upon Remand, and the responses thereto, it is hereby **ORDERED** that:

1. The Court's Order of June 10, 2003 is amended as follows:
    a. Paragraphs 1, 2, and 4 are **VACATED**.
    b. Judgment is entered in favor of Berg Chilling Systems, Inc. and against Hull Corporation;
    c. Judgment is entered in favor of SP Industries, Inc. and against Hull Corporation; and
    d. Judgment is entered in favor of SP Industries, Inc. and against Berg Chilling Systems, Inc.
2. In all other respects, the Court's Order of June 10, 2003 shall remain in effect.
3. No later than **August 30, 2004**, Berg and SPI shall submit briefs regarding damages and any other outstanding issues remaining in this case. Response briefs shall be

filed no later than **September 20, 2004**.

BY THE COURT:

Berle M. Schiller, J.